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In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 589

ALEXANDER STEELE,
Petitioner,

vs.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, in and for the City and County of San Francisco, and ALFRED J. FRITZ and ROBERT McWILLIAMS, as Judges thereof,
Respondents.

PETITION FOR WRIT OF CERTIORARI to the United States Circuit Court of Appeals for the Ninth Circuit and BRIEF IN SUPPORT THEREOF

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In the Supreme Court of the United States

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No.

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THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, in and for the City and County of San Francisco, and ALFRED J. FRITZ and ROBERT MCWILLIAMS, as Judges thereof,

Respondents.

PETITION FOR WRIT OF CERTIORARI to the United States Circuit Court of Appeals for the Ninth Circuit

To the Honorable Fred M. Vinson, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

The petition of Alexander Steele for a Writ of Certiorari directed to the United States Circuit Court of Appeals for the Ninth Circuit respectfully shows:

SUMMARY AND STATEMENT OF THE MATTER INVOLVED

Petitioner filed in the United States District Court his Complaint praying for an injunction restraining respondents from proceeding with the trial of a criminal action, pending in the State court, on the ground that said criminal action had been removed to said District Court pursuant to the provisions of section 31 of the Judicial Code (28 U.S.C.A. sec. 74) and that, by reason of such removal, the State court no longer had jurisdiction of the offense and the District Court had sole jurisidiction thereof with the right and power to enjoin the State court from encroaching on the Federal court's jurisidiction.

The statute (28 U.S.C.A. 74) provides for removal to the Federal court:

> "When any * * * criminal prosecution is commenced in any state court, for any cause whatsoever, against any person who is denied or cannot enforce in the judicial tribunals of the state, * * * any right secured him by any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction of the United States * * *."

The Complaint is set forth in the record (R. 2-10) and annexed thereto and incorporated therein is a copy of the removal petition filed in the State court and subsequently docketed in the District Court (R. 11-27).

Respondents filed no answer or traverse to the Complaint, therefore, **all the allegations of the Complaint must be taken as true for all purposes of this proceeding.**

Respondents filed a motion to dismiss the Complaint in the District Court (R. 29), which motion was granted (R. 31).

An appeal was taken to the United States Circuit Court of Appeals from the order dismissing the Complaint and that Court upheld the action of the trial Judge for the reasons hereinafter set forth.

No order was ever made remanding the criminal cause to the State court.[1]

The question involved was whether the removal petition set forth grounds for removal under the foregoing statute.

(a) Summary of the Allegations of the Petition for Removal.

The pertinent facts set forth in the petition for removal are as follows:

That at all times mentioned, the said Alexander Steele was and now is a citizen of the United States of America (R. 11);[2]

That during the month of April, 1946, petitioner was living in his home and residence located in apartment number 7 in that building designated as number 945 Geary Street, in the City and County of San Francisco (R. 12);

That on April 18, 1946 a peace officer of the State of California and a regular member of the Police Department of the City and County of San Francisco, without any warrant, writ or other process of any kind or character, and without the consent of petitioner, forcibly broke into his said apartment, home and dwelling and, against the wish, will and consent of petitioner, took therefrom certain particularly described papers, documents and writ-

1. Though the record does not so disclose, the District Judge granted an injunction enjoining the State court from taking any further steps in the criminal action during the pendency of this appeal.

2. This allegation is also contained in Paragraph I of the Complaint (R. 2).

ings (hereinafter referred to as said property) in violation of the due process clause of the 14th Amendment and, **"in violation of the right of petitioner to be secure in his house, papers and effects against unreasonable search and seizure;"** (R. 12, 13).

That thereupon petitioner was placed under arrest by said police officer, without any warrant, and thereafter said police officer did swear to and file in the Municipal Court of the City and County of San Francisco, a Complaint charging petitioner with three violations of section 337A of the California Penal Code, said offenses being felonies commonly known and referred to as bookmaking and pool-selling (R. 13);

That at the preliminary examination before the Committing Magistrate, the State of California offered and there was received in evidence the said property so taken from petitioner's home as aforesaid, over the express and specific objection of petitioner "that the same had been acquired as the result of unlawful search and seizure" and that the manner in which the property had been acquired and its use in evidence "were in violation of the rights granted to petitioner by the due process clause of the 14th Amendment" and **"in violation of the rights of petitioner to be secure in his person, papers, house and effects against unreasonable searches and seizures as guaranteed to him by the 14th Amendment to the Constitution of the United States;"** (R. 14).

That upon the conclusion of the evidence in said Municipal Court, an order was made holding defendant to answer to the Superior Court of the State of California (R. 15);

That thereafter there was filed in respondent court, an information charging him with the three felonies as aforesaid (R. 15);

That after the filing of said information, petitioner appeared in said Superior Court in said criminal proceeding and did file therein his motion for the return of said property so seized as aforesaid and its suppression as evidence.[3]

That after argument, respondents did deny said motion upon the ground that pursuant to decisions of the Supreme Court of the State of California, **there was no procedure whereby evidence otherwise competent could be excluded due merely to the manner in which the same was acquired, even though such acquisition of evidence had been in violation of defendant's right to be secure against unreasonable search and seizure** (R. 17). This motion was made long prior to any date set for the trial of the action;

That petitioner entered his plea of not guilty to the charges in said information; that at his trial, the respondents' will, pursuant to the decisions of the Supreme Court of the State of California, admit said property in evidence despite any objection to its use that may be made by petitioner (R. 18).

Paragraph X of the removal petition (R. 18-21) sets forth, that despite the provisions of the California Constitution, Article I, section 19, declaring the rights of the people to be secure against unreasonable searches and seizures and that such rights shall not be violated, the Supreme Court of the State of California in an unbroken

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3. A copy of said motion is attached to petition for removal and is set forth in the record (R. 25-27).

line of decisions, citing them,[4] has consistently construed such constitutional provision in a manner contrary to the letter, spirit and intent of the unlawful search and seizure clause as set forth in the 4th Amendment to the Constitution of the United States and has held and construed the right to be secure from unlawful search and seizure as operative in the State of California and the rights of an accused person thereunder to be as follows, to wit:

(a) That under the law of the State of California there is no proceeding existing in a criminal action whereby a defendant and accused may bring any motion or proceeding for the purpose of suppressing as evidence against said defendant and accused evidence acquired by peace officers of the State of California in violation of the constitutional provision against unlawful and unreasonable search and seizure;

(b) That even though peace officers of the State of California acquire evidence as the result of unlawful breaking and entry into the home and dwelling of a defendant or by a burglarious entry therein, there is no procedure under the law of the State of California whereby property taken by said peace officers as the result of such unlawful or burglarious entry can be excluded as evidence at the trial of the person from whom such property was taken if such evidence is otherwise competent;

(c) That though the Constitution of California prohibits unreasonable and unlawful searches and seizures and provides that no warrant therefor shall issue except upon

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4. *People v. Mayen* (1922) [illegible] 237; *Parker v. Board of Dental Examiners* (1932), 216 [illegible] 300; *Herrscher v. State Board* (1935), 4 Cal. (2d) 399, 41[illegible] *ople v. Gonzales* (1942), 20 Cal. (2d) 165; *People v. Kelly* (1943), 22 Cal. (2d) 169.

reasonable and probable cause, there is no procedure known to the law of the State of California that will prevent a peace officer from violating said provision or that will prevent the use in evidence of property acquired by such unlawful acts of a peace officer and that the person from whom said property is taken has no redress under the law of the State of California either in any criminal prosecution brought against the owner of such property or in any other manner or action, civil or criminal, save and except a civil action against the peace officer who so unlawfully acquired the same.

Paragraph XI of the removal petition alleges that by reason of the foregoing matters and things "petitioner is being denied and can not enforce in the judicial tribunals of the State of California * * * all of the rights secured to him by the laws of the United States providing for the equal civil rights of citizens of the United States and is being and will be deprived of the equal protection of the law" and of the rights guaranteed to him by section 1 of the 14th Amendment to the Constitution of the United States, including the rights contained in the privilege and immunity clause, the due process of law clause and the equal protection of the laws clause.[5]

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5. The Complaint (R. 4-5) alleges the doing of all things required by the removal statute to transfer jurisdiction to said District Court. The opinion of the Circuit Court of Appeals concedes that all statutory steps were properly taken and that the cause was removed to the Federal court, providing the facts set forth in the removal petition fell within the statute (R. 43).

(b) The Opinion of the Circuit Court of Appeals and the Errors Contained Therein

The opinion of the Circuit Court of Appeals was rendered on December 8, 1947 (R. 47) upholding the action of the trial court in dismissing the complaint. On the filing of a petition for a rehearing, the Court denied the same on January 8, 1948 but amended its prior opinion (R. 48).

The Circuit Court of Appeals by its decision has not only construed the removal statute in a manner contrary to its language and pertinent decisions of this Court, but has so restricted its operation as to render it almost inoperative. Furthermore, the Circuit Court of Appeals has dealt with the propositions involved as if they were confined solely to the admission of evidence at the time of trial in the State Court, **while one of the main questions actually presented was the denial by state law of any process or procedure whereby, anterior to the trial, evidence acquired by unreasonable search and seizure could be suppressed.**

We here set forth the pertinent provisions of the opinion of the Circuit Court of Appeals, as amended:

> "The burden of appellant's argument deals with the question of rights guaranteed him by the Fourteenth Amendment to the Constitution of the United States which will be denied him by the use of evidence illegally obtained at the trial of his case. We think the question thus posed deals exclusively with the admissibility of evidence and state procedure. The courts of California have held proper the admission of evidence of this character and have sustained convictions based thereon in whole or in part. How-

ever, the procedure adopted by the California courts has been applied with equality as to all citizens of the United States who come before those courts. Nothing appears in the petition for removal, nor is it urged, that appellant, when and if he appears for trial, will be in any different position or denied any right accorded any other citizen of the United States placed in the same position.

If in the procedure adopted by the California courts and by it equally applied to all citizens of the United States there lurks a violation of other rights guaranteed by the Fourteenth Amendment that fact alone is not sufficient to justify removal to the United States District Court. We hold that in order to authorize removal as provided in Section 31 of the Judicial Code a violation of the equal protection clause of the Fourteenth Amendment must be shown. Some equal civil right must be denied, such as a discrimination against a particular race." (R. 45)

The decision of the lower court confines the operation of the removal statute solely to instances where there has been a violation of the equal protection clause of the 14th Amendment. **Such is not the language of the statute.**

The decision further holds that so long as the right to be secure from unreasonable search and seizure and the process and procedure for the enforcement of that right are denied to all citizens of the United States within the State of California, that no violation of the 14th Amendment has occurred. This is directly contrary to the decision of this court in *Colgate v. Harvey*, 296 U.S. 404, wherein it was held that the rights of citizens of the United States must be equal throughout the Nation as distinguished from being merely equal within any particular State.

The decision further holds, directly and inferentially, that the right to be secure from unreasonable search and seizure is not such a right guaranteed by any clause of the 14th Amendment that it cannot be violated under the guise of local practice or procedure and that the denial of any process anterior to trial, whereby such unlawfully acquired evidence can be suppressed, is also a matter of local practice and procedure. This is contrary to the holdings of this court in *Angel v. Bullington*, ... U.S. .... 91 L. ed. Adv. Ops. 557, 560 and *Brown v. Mississippi*, 297 U.S. 278; holding that no State can deny any right guaranteed by the Federal Constitution under the guise of State court procedure or local rules of evidence.

The decision fails to distinguish the rights given a citizen of the United States under the privilege and immunity clause of the 14th Amendment and the rights protected by the equal protection clause of that Amendment, a distinction fully recognized by this court in *Colgate v. Harvey, supra.*

Lastly, the decision erroneously holds that there was no violation of the equal protection clause of the 14th Amendment. Under the California Penal Code, sections 1523 to 1541, where a search warrant is issued and property taken thereunder, the owner is given his day in court and if it be established that the warrant was issued without reasonable or probable cause, the property taken must be returned to him; whereas, when there is an unreasonable search and seizure without a warrant, California affords no process whereby the owner can have such property returned to him or prevent its use as evidence against him in a trial. This constitutes an unequal application of the law and denies the equal protection of the law.

JURISDICTIONAL STATEMENTS

(a) Jurisdiction of the Supreme Court.

The jurisdiction of this Court is invoked under section 240a of the Judicial Code as amended (28 U.S.C.A., sec. 347).

(b) The Decision and Judgments of the Circuit Court of Appeals.

The original decision and opinion of the Circuit Court of Appeals was rendered and filed on December 8, 1947 (R. 42).

The judgment and decree of the Circuit Court of Appeals was rendered and filed on December 8, 1947 (R. 47).

The order denying a petition for rehearing and amending the prior opinion was made and filed on January 8, 1948 (R. 48).

(c) The Grounds Upon Which It Is Contended the Supreme Court Has Jurisdiction and Cases in Support Thereof.

The basis upon which it is contended this Court has jurisdiction and cases supporting such jurisdiction in addition to those previously cited, are as follows:

1. The decision of the lower Court, construing the Removal Statute (28 U.S.C.A. 74) as being strictly confined to cases where there is shown a violation of the equal protection clause of the Fourteenth Amendment, is a decision on an important question of Federal law which has not been but should be settled by the Supreme Court. In such cases this Court has jurisdiction to review the question involved as was held in such cases as *Worcester County Trust Co. v. Riley*, 302 U.S. 292; *International Ry. Co. v. Davidson*, 257 U.S. 506; *Federal Trade Comm. v.*

Raladam Co., 316 U.S. 149; *Williams v. Jacksonville Terminal Co.*, 315 U.S. 386.

2. The decision of the lower court misconstrues the Removal Statute by holding that the equal application of Federal laws according rights to all citizens of the United States is not violated by state action denying such rights, so long as the denial operates upon all citzens of the United States within the state's boundaries. Where there is a misconstruction of a statute by the lower appellate court this court has jurisdiction to correct such error by writ of certiorari. *Federal Trade Co. v. Raladam Co.*, 316 U.S. 149, 150.

3. The decision of the lower court holding that state action does not violate the privileges and immunities of citizens of the United States, as set forth in the Fourteenth Amendment, so long as such privileges and immunities are denied to all such citizens within state boundaries, is in direct conflict with the prior decision of this Court in *Colgate v. Harvey*, 296 U.S. 404, wherein this Court reviewed such error.

4. The decision of the lower court holding that a state, under the guise of state court procedure and local rules of evidence, may infringe upon and deny rights guaranteed by the Federal Constitution, is in direct conflict with the following decisions of this Court in which review was granted to correct such error: *Angel v. Bullington*, ... U.S. ...., 91 L. ed. Ad. Op. 557, 560; *Brown v. Mississippi*, 297 U.S. 278.

5. Where a question of the applicability of the Removal Statute is involved, this Court has exercised jurisdiction to review the action of the lower court. *Strauder*

v. West Virginia, 100 U.S. 303; *United States v. Reese,* 92 U.S. 214; *Ex parte Virginia,* 100 U.S. 313; *Neal v. Delaware,* 103 U.S. 370; *Kentucky v. Powers,* 201 U.S. 1.

THE QUESTIONS PRESENTED AND REASONS RELIED UPON FOR ISSUANCE OF THE WRIT

The questions herein presented are as follows:

1. Does not the provision of the Removal Statute (28 U.S.C.A 74) authorizing removal where "any person * * * is denied or cannot enforce * * * any right secured to him by any law providing for the equal civil rights of citizens of the United States," relate to the denial of any civil right of a citizen of the United States, irrespective of whether such right is denied by a state to one, more or all of the citizens of the United States within such state's boundaries?

2. Is the foregoing provision of the Removal Statute confined solely to instances where there is "a violation of the equal protection clause of the Fourteenth Amendment * * * Such as a discrimination against a particular race," as held by the lower court, or does not such provision operate when all citizens of the United States, within state boundaries, are denied a civil right of citizens of the United States?

3. Are not the "privilege and immunity" clause and the "equal application of the laws" clause of the Fourteenth Amendment separate and distinct prohibitions of the Fourteenth Amendment and, if so, cannot an equal civil right of a citizen of the United States be denied by

a state without there being a violation of the equal protection clause?

4. If the right to be secure from unreasonable search and seizure is a right belonging to citizens of the United States, can a state deny such right under the guise of local practice or procedure?

5. Is not the express denial by a state of any process in its courts for the enforcement or protection of a Constitutional right, a violation of the Fourteenth Amendment?

6. Is not the right to be secure from unreasonable search and seizure, together with the right not to have property acquired thereby used as evidence against the owner in a criminal prosecution, protected by the Fourteenth Amendment?

7. Is not the right to be secure against unreasonable search and seizure, a privilege of United States citizenship?

8. Does not the right of an American citizen to hold, acquire and lease real property (8 U.S.C.A. 42) carry with it the right to the peaceful and quiet enjoyment thereof so that the property cannot be invaded by peace officers conducting an unreasonable search and seizure without a warrant?

9. Does not a violation of the equal protection clause of the Fourteenth Amendment occur as to one who is subjected to an unreasonable search and seizure and property so taken is used as evidence against him, the state denying any process in its courts whereby such property can be suppressed or excluded as evidence; although if such property were taken under a search-warrant the

owner by law is given a hearing in court and the property ordered returned to him—thus excluding its use as evidence against him, if it be found that the warrant was issued without reasonable or probable cause?

Each of the foregoing questions are of grave importance and are questions that should be definitely decided by the Supreme Court of the United States.

This Court has never directly decided whether the *right* to be secure from unreasonable search and seizure is a right belonging to citizens of the United States and protected by the privilege and immunity clause, although it has many times announced that such right is a fundamental principle of liberty and justice, to be regarded as the very essence of constitutional liberty, and that its guaranty is as important and imperative as are the guaranties of the other fundamental rights of the individual citizen (*Harris v. United States,* decided May 5, 1947, 91 L. ed. Ad. Op. 1013, 1016; *Gouled v. United States,* 255 U.S. 298). A decision of this Court should be rendered on this question in order that American citizens can have enforced in state courts such right if it so exists.

This Court has never stated, as did the lower court, that the Removal Statute only applies where a state has denied the equal application of the laws within its boundaries, thus excluding from such statute's operation a denial of a privilege or immunity of a citizen of the United States. The very purpose sought to be achieved by the Removal Statute was the protection of every privilege and immunity of American citizens. This Court should definitely construe the statute involved.

This Court should not allow to stand, as the law of a reported case, the holdings of the lower court (a) that a state does not deny the equal application of the laws if it denies a Constitutional right to all within its boundaries; (b) that under the guise of local procedure a state can deny any process or proceeding in its courts for the protection of a Constitutional right; (c) that where government agents act in an illegal manner the aggrieved party has no redress in the state courts, although if such agents acted under legal authority the courts were open to redress any wrong done by such agents.

Lastly, the decision of the lower court construes the removal statute in a manner that does violence to its express language.

For each and all of these reasons and those others readily suggested by the foregoing statement of the questions involved, we believe that the writ should issue as prayed for herein.

WHEREFORE, petitioner prays that this Honorable Court issue a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit to the end that the questions involved may be fully presented and justice done in the premises.

Dated, San Francisco, California,
February 10, 1948.

Respectfully submitted,

LEO R. FRIEDMAN,
Attorney for Petitioner.

CERTIFICATE OF COUNSEL

I hereby certify that I am a member of the bar of the Supreme Court of the United States and that I am counsel for the petitioner in the above-entitled cause and that, in my judgment, the foregoing petition is well founded in point of law as well as in fact and that said petition is not interposed for delay.

Dated, San Francisco, California,
February 10, 1948.

LEO R. FRIEDMAN,
Attorney for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED AND CASES IN SUPPORT THEREOF

The jurisdiction of this Court is invoked under section 240(a) of the Judicial Code, as amended (28 U.S.C.A. 347).

The grounds on which the jurisdiction of this Court is invoked and the cases believed to sustain the jurisdiction have been fully set forth in the foregoing petition under a similar heading and, to avoid repetition, will not be repeated here.

THE OPINION AND JUDGMENTS BELOW

The order of the trial court, dismissing the complaint, was entered on February 27, 1947 (R. 31).

The opinion of the Circuit Court of Appeals was rendered and filed on December 8, 1947 (R. 42).

The judgment of the Circuit Court of Appeals was entered on December 8, 1947 (R. 47).

The order denying a rehearing and amending the prior opinion was made and filed on January 8, 1948 (R. 48).

THE STATUTES INVOLVED

The Removal Statute, Criminal Code, sec. 31, 28 U.S.C.A. 74, reads in part as follows:

> "When any civil suit or criminal prosecution is commenced in any State court, for any cause whatsoever, against any person who is denied or cannot

> enforce in the judicial tribunals of the State, or in the part of the State where such suit or prosecution is pending, any right secured to him by any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction of the United States * * * such suit or prosecution may, upon the petition of such defendant, filed in said State court at any time before trial or final hearing of the cause, stating the facts and verified by oath, be removed for trial into the next district court to be held in the district where it is pending. Upon the filing of such petition all further proceedings in the State courts shall cease and shall not be resumed except as hereinafter provided. * * *"

California Constitution, Article I, Sec. 19, prohibiting unreasonable searches and seizures and providing that no warrant shall issue except upon reasonable and probable cause, *as construed by the decisions of the California Supreme Court.*[6]

STATEMENT OF THE CASE

A full statement of the case, the questions presented and the importance thereof, have been set forth in full in the foregoing petition, reference to which is hereby made and repetition thereof omitted so as not to prolong this brief. The questions presented will be set forth in full in the following specification of errors relied upon.

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6. The question of whether the California Constitutional provision violates the Federal Constitution must be determined by the decisions of the highest court of the state construing such provision and not by the wording thereof. *Highland Farms Dairy v. Agnew,* 300 U.S. 608, 613; *St. Louis etc. Co., v. Arkansas,* 235 U.S. 350, 362; *Storaasli v. Minnesota,* 283 U.S. 57, 62; *Madden v. Kentucky,* 309 U.S. 83, 87.

SPECIFICATION OF ASSIGNED ERRORS RELIED ON

The Circuit Court of Appeals erred in each of the following matters and holdings:

1. In holding that the complaint did not state a cause of action for the issuance of an injunction as prayed for.

2. In holding that the Petition for Removal of the criminal case to the district court did not state facts justifying such removal as provided for in the Removal Statute.

3. In holding that the Removal Statute only applied to cases where "a violation of the equal protection clause of the Fourteenth Amendment must be shown. Some equal right must be denied, such as a discrimination against a particular race."

4. In holding that the right to be secure from unreasonable search and seizure was not an equal civil right of citizens of the United States.

5. In holding that the express denial by the State of California of any process or procedure in its courts, for the protection of the right to be secure from unlawful search and seizure, was not (a) a violation of the Fourteenth Amendment, and (b) a denial of an equal civil right of citizens of the United States.

6. In holding that the right to be secure from unreasonable search and seizure was not a privilege and immunity of citizens of the United States, and that the denial by the state of any redress in its courts for the violation of such right or for the suppression of evidence procured by such search and seizure, was not a denial of such privilege and immunity.

7. In holding that no violation of the equal protection clause of the Fourteenth Amendment occurred as to petitioner, although he was subjected to an unlawful search and seizure by state officers without a warrant and denied any process or remedy in the state courts for the suppression as evidence against him of the property procured thereby, although others occupying the same position were given a remedy, under the California Penal Code, for the return of property seized under a search-warrant if, on a hearing as provided for, it be determined that the warrant was issued without reasonable or probable cause.

8. In holding that a state had not violated any provision of the Fourteenth Amendment, though a Federal Constitutional right had been infringed and denied, so long as the state had infringed and denied such right to all persons within its jurisdiction.

9. In holding that a state can infringe and deny a constitutional right under the guise of local practice and local rules of evidence.

ARGUMENT

The foregoing specification of errors is a correct summary of the argument that follows.

The propositions advanced for determination fall into three main divisions. First, the erroneous construction placed by the Circuit Court of Appeals on the Removal Statute. Second, whether the right to be secure from unreasonable search and seizure, together with the attendant right to be accorded process in the state court for the enforcement and protection of such right, is not an attribute of American citizenship and an equal civil right of citizens of the United States as prescribed in the Removal Statute.

Third, Whether the distinction, sanctioned by California and approved by the lower court, between house-holders whose premises have been searched under a search-warrant and those whose premises have been searched without a warrant is not a violation of the equal protection clause of the Fourteenth Amendment.

Although the lower court assumed or conceded that California affords no remedy in its courts to one whose home has been violated by officers conducting therein an unreasonable search and seizure without any warrant, we first point out the decisions of the highest court of California on the subject.

I. THE CALIFORNIA SUPREME COURT HAS DESTROYED THE RIGHT TO BE SECURE FROM UNREASONABLE SEARCH AND SEIZURE AND DENIED ALL REMEDY IN THE STATE COURTS FOR THE PROTECTION OF SUCH RIGHT. SUCH ACTION BY THE STATE IS ITSELF A VIOLATION OF THE 14TH AMENDMENT.

First, we emphasize the proposition that in deciding whether a state statute or constitutional provision runs counter to the Federal Constitution, the question must be decided on the construction given thereto by the highest court of the state and not on the wording of the provision.[7]

Next, we call attention to the fact that in deciding the applicability of the Removal Statute (Judicial Code, sec. 31), it is immaterial whether the federal constitutional right is denied by a state statute or by a provision of the State Constitution. In this regard see: *Kentucky v. Powers*, 201 U.S. 1, 31.

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7. The cases of this Court so holding are set forth in Footnote 6.

Article I, sec. 19 of the Constitution of California reads as follows:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable seizures and searches, shall not be violated; and no warrant shall issue, but on probable cause, supported by oath or affirmation, particularly describing the place to be searched and the persons and things to be seized."

Although the foregoing provision is almost identical with that of the Fourth Amendment and was declared by the California Supreme Court to have been adopted "in almost the precise words and for the same reason, as in the Federal Constitution" (*People v. Mayen*, 188 Cal. 237, 249; 205 Pac. 435); nevertheless the highest court of California has so construed the provision as to "reduce it to a form of words" and **to sanction under its provisions the most flagrant violations of personal privacy and personal security, without affording in the courts of California any remedy of any kind whatsoever to those whose rights have been violated.**

The law of search and seizure has been construed by the California Supreme Court, in an unbroken line of decisions, as follows:

1. That no provision of the Federal Constitution prohibits the use, as evidence in the California courts, of property acquired by an unreasonable search and seizure without a search-warrant (*People v. Gonzales* (1942), 20 Cal. (2d) 165, 170; 124 Pac. (2d) 44; *People v. Kelly* (1943), 22 Cal. (2d) 169, 173; 137 Pac. (2d) 1).

2. Where a person's home has been violated by state officers and unlawful entry made and property unlawfully

seized, in a criminal prosecution in which such unlawfully seized property is used as evidence, the law of California does not give to the accused any right, motion or procedure in such criminal case, no matter how seasonable such right is asserted, whereby he can procure a return of such property or suppress its use as evidence (*People v. Mayen, supra,* p. 251; *People v. Gonzales, supra,* p. 169). In *People v. Kelly,* 22 Cal. (2d) 169, 172, the California Court holds:

> "Although the federal courts forbid the introduction of evidence illegally obtained from the accused upon his timely motion for its exclusion (citing cases), *the accepted rule in most of the states, including California, is to the contrary.*"

3. That even though a seasonable motion is made for the return of such property or its exclusion as evidence and such motion is denied and the owner convicted, the question of the correctness of the trial court's action cannot be reviewed on appeal (*People v. Mayen, supra,* p. 252);

4. That the only remedy available in California to one whose property has been seized by state officers as the result of an unreasonable and unlawful search, is a civil suit against the state officers, *People v. Gonzales, supra,* p. 169, where it is stated:

> "The defendant may have civil and criminal remedies against the officers for their illegal acts • • • but the state is not precluded from using the evidence obtained thereby."

5. That the right to be secure from unreasonable search and seizure is something different from the right of the

state to use evidence acquired thereby at a trial against the owner; and that the right is violated when the search and seizure takes place and not by the subsequent use of the seized property as evidence. Thus, in *People v. Gonzales, supra,* p. 170, the California court states:

> "In the determination of whether prohibition against unreasonable searches and seizures is included within this concept, the unlawful search and seizure must be distinguished from the introduction in court of the evidence obtained as a result thereof."

The foregoing holdings have consistently been adhered to by the California Supreme Court in cases passing upon one or another phase of the proposition from 1922 to date.[8]

Of course, to admit the right to be secure from unreasonable search and seizure and, in the same breath, deny any remedy for a violation thereof, or any process whereby the evidence so procured can be suppressed or excluded, is an actual denial of the right.

This Court has repeatedly held that to permit the use of evidence, over timely objection, acquired by unreasonable search and seizure is to reduce the right "to a form of words" and "of no value" and "that it might as well be stricken from the Constitution."

Silverthorne Lumber Co. v. United States, 251 U.S. 382;

Olmstead v. United States, 277 U.S. 438, 463;

Weeks v. United States, 232 U.S. 382;

Byars v. United States, 273 U.S. 28.

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8. See other California cases cited in Footnote 4 to the Petition.

As demonstrative of the utter destruction of the right by the California Supreme Court and the extreme lengths to which state officers are permitted to go in violation of the constitutional right, we call attention to the case of *People v. One Mercury Sedan,* 74 Cal. App. (2d) 199, 168 Pac. (2d) 443, in which case the trial court excluded the illegally acquired evidence, the state appealed, the intermediate appellate court reversed the trial court and held the evidence admissible and the State Supreme Court upheld the ruling of the appellate court and denied a hearing. **The facts are sufficient to shock every person who has regard for the fundamental rights of citizens and believes that constitutional guaranties are something more than mere words.** These facts as stated in the reported case are as follows:

> "The record discloses that on April 18, 1944, an inspector of the State Division of Narcotic Enforcement followed the Williams car for some distance. He testified that he then knew the car was being used to transport marihuana. The inspector picked up two police officers and then stopped the Williams car then being driven by Williams. Williams got out of the car. The inspector handcuffed one of the passengers and then came over to where the police officers were attempting to search Williams. As he approached, Williams, who had some brown paper in his hands, put the paper in his mouth and tried to pull away from the officers. The inspector asked Williams what he had put in his mouth and was told it was gum. The inspector tried to force Williams' mouth open, and in doing so got his finger between Williams' teeth. Williams bit down on the inspector's finger, and, in the ensuing struggle, Williams succeeded in swallowing what he had in his

mouth. **One of the officers during the struggle succeeded in handcuffing Williams' hands behind his back.**

Williams, still handcuffed, was then put in the inspector's car and taken by the officers to the emergency hospital. He was there placed on an operating table with his hands cuffed in front of him. He was told that the doctor there present was going to pump out his stomach, and, if necessary, they would strap him to the table and use force. Williams stated that would not be necessary. **A doctor thereupon forced a tube through Williams' mouth and down his throat and proceeded to pump out the contents of his stomach.** Towards the end of this operation Williams began to kick his legs about and the officers then held his legs down on the table.

The substances pumped out of Williams' stomach were placed in jars by the inspector and later delivered to another inspector of the State Division of Narcotic Enforcement whose duty it was to make analyses of narcotic drugs. This chemist made an analysis of the contents of the jars and found that they contained marihuana."

A reading of the foregoing facts may well pose the question as to what further lengths state officers can and will go, under the decisions of the Supreme Court of California, in acquiring and using evidence. If they can resort to the use of stomach pumps, it is not beyond the realm of probability that eventually they will be performing capital operations on persons for the purpose of procuring evidence and the persons so cut open will have no redress under the laws of California.

It is high time that these state evils be corrected by the Federal Supreme Court.

II. THE CIRCUIT COURT OF APPEALS ERRED IN HOLDING THAT THE REMOVAL STATUTE ONLY OPERATED IN CASES WHERE THERE WAS A VIOLATION OF THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

The lower court held that the facts set forth in the removal petition were insufficient for such purpose for the following reasons:

> "We hold that in order to authorize removal as provided in section 31 of the Judicial Code, a violation of the equal protection clause of the Fourteenth Amendment must be shown. Some equal civil right must be denied, such as a discrimination against a particular race." (R. 46)

The Removal Statute provides that a removal takes place as a matter of law when, in any criminal prosecution in a State court, the accused "is denied or cannot enforce in the judicial tribunals of the State * * * any rights secured to him by any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction of the United States."

The Removal Statute thus covers a denial of any privilege or immunity of a citizen of the United States.

A mere comparison of the language of the statute with the language used by the lower court should demonstrate that the construction placed on the statute by the lower court is contrary to and an abridgment of its terms.

The statute is in the singular and expressly provides that it shall operate when "any person" is denied or cannot enforce any rights secured to "him" by any law providing for the equal civil rights of citizens of the United States.

The purport and extent of the provisions of the Removal Statute are set forth in *Kentucky v. Powers,* 201 U.S. 1, 27, as follows:

> "After referring to what was said in *United States v. Reese,* 92 U.S. 214, 23 L. ed. 563, to the effect that the rights and immunities created by or dependent upon the Constitution of the United States can be protected by Congress, and that the form and manner of the protection may be such as Congress, in the legitimate exercise of its legislative discretion, shall provide, the court said: 'There is express authority to protect the rights and immunities referred to in the 14th Amendment, and to enforce observance of them by appropriate congressional legislation. And one very efficient and appropriate mode of extending such protection and securing to a party the enjoyment of the right or immunity is a law providing for the removal of his case from a state court, in which the right is denied by the state law, into a Federal court where it will be upheld. This is an ordinary mode of protecting rights and immunities conferred by the Federal Constitution and laws.' "

In *Hull v. Jackson County Circuit Court* (C.C.A. 6), 138 Fed. (2d) 820, 821, it is stated:

> "The removal of a criminal prosecution or a civil cause under the statute in question because of the denial of a civil right or the enforcement of such a right must arise out of the destruction of such right by the constitution or statutory laws of the state wherein the action is pending."

There is a distinction between citizens of the United States and citizens of a state. Each citizenship has its own privileges and immunities. A state may abridge the

privileges and immunities of state citizens, but cannot abridge the privileges or immunities of citizens of the United States (*The Slaughter-House* cases, 83 U.S. 36, 73 to 77).

A privilege or immunity of Federal citizenship need not find expression in any positive statute of the United States before it will be protected by the 14th Amendment:

> "The 14th Amendment makes no attempt to enumerate the rights it designed to protect. It speaks in general terms, and those are as comprehensive as possible. Its language is prohibitory; but **every prohibition implies the existence of rights and immunities,** * * *"
>
> *Strauder v. Virginia,* 100 U.S. 303, 25 L. ed. 664, 666.

and later on the same page the Court in the *Strauder* case states:

> "A right or an immunity, whether created by the Constitution or only guaranteed by it, even without any express delegation of power, may be protected by Congress."

Then the Court, on authority of *United States v. Reese,* 92 U.S. 214, holds that the removal statute is the appropriate method for protecting such a right guaranteed by the 14th Amendment.

Thus, the Removal Statute is not confined merely to cases where there has been a violation of the equal protection of the laws; it operates whenever an equal civil right or immunity guaranteed by the Constitution of federal laws has been denied or cannot be enforced in the state tribunals. In other words, the Removal Statute

covers cases wherein the privilege and immunity clause of the 14th Amendment is violated or denied by state action. The decision of the lower court is erroneous.

III. THE LOWER COURT ERRED IN HOLDING THAT A VIOLATION OF THE CONSTITUTION DOES NOT OCCUR SO LONG AS THE STATE DENIES A CONSTITUTIONAL RIGHT TO ALL PERSONS WITHIN ITS JURISDICTION.

The decision of the lower court either concedes or assumes that the right to be secure from unreasonable search and seizure and to have process for the enforcement of such right falls within the protection of the 14th Amendment, but holds that the denial of such right does not constitute a violation of the equal protection of the laws clause because California has denied such right or remedy to all persons within its boundaries. The language of the lower court in this regard is as follows:

> "However, the procedure adopted by the California Courts has been applied with equality as to all citizens of the United States who come before those Courts. Nothing appears in the petition for removal, nor is it urged, that appellant, when and if he appears for trial, will be in any different position or denied any right accorded any other citizen of the United States placed in the same position." (R. 45)

The foregoing constitutes most flagrant error. The holding is to the effect that if a Federal right is denied to some and not others within the State, a violation of the Constitution takes place and the Removal Statute operates; but if all persons within the State are denied the constitutional right, then no violation of the Constitution occurs and no ground for removal exists.

The foregoing holding of the lower court is in direct conflict with a prior decision of this Court.

In *Colgate v. Harvey*, 296 U.S. 404, 80 L. ed. 299, the Supreme Court has laid this proposition at rest in the following holdings:

At page 426, it is stated:

> "But, assuming that the State of Vermont is benefited by the exemption, the complete answer is that appellant is a citizen of the United States; and, **quite apart from the equal protection of the laws clause,** the suggestion is effectively met and overcome, and the fallacy of other attempts to sustain the validity of the exemption here under review clearly demonstrated, by reference to the privileges and immunities clause of the Fourteenth Amendment. 'For all the great purposes for which the Federal government was formed', this court has said, 'we are one people, with one common country.' Crandall v. Nevada, 6 Wall. 35, 48, 49, 18 L. ed. 745, 748, 749. **As citizens of the United States we are members of a single great community consisting of all the states united and not of distinct communities consisting of the states severally.** No citizen of the United States is an alien in any state of the Union; and the very status of **national citizenship connotes equality of rights and privileges, so far as they flow from such citizenship, everywhere within the limits of the United States.** This fact is obvious and vital and no elaboration is required to establish it." (Emphasis supplied.)

The foregoing demonstrates two propositions, viz.: (a) that the privilege and immunity clause of the Fourteenth Amendment is something separate and distinct from the equal protection of the laws clause and (b) that the

privilege and immunity clause means that such privileges and immunities must be enjoyed alike by all persons throughout the United States and not merely by all persons within one of the United States. Therefore, an equal civil right means a right that it to be enjoyed by all throughout the United States and an equal civil right is denied when any one state refuses to enforce it within the confines of its own borders.

Again, in *Colgate v. Harvey,* supra, at page 428, the Supreme Court quotes from the *Slaughter House Case* as follows:

> "But the fourteenth amendment prohibits any state from abridging the privileges or immunities of the citizens of the United States, whether its own citizens or any others. It not merely requires equality of privileges; but **it demands that the privileges and immunities of all citizens shall be absolutely unabridged, unimpaired."**

The foregoing holdings demonstrate the error in the decision. Equality of operation within state limits is not the test. Equality throughout the United States is the demand of the Constitution and denial of such equality within any defined portion of the United States constitutes a violation of the Constitution. The right not to be deprived in any way of life, liberty and property, except in accordance with law, is an attribute of United States citizenship (*Allgeyer v. Louisiana,* 165 U.S. 578, 589, 41 L. ed. 832, 835). Inherent in the right of liberty is the right to be secure in one's home against unreasonable search and seizure. Where a state denies this right to all within its boundaries, it is denying an equal civil right guaranteed by the Constitution.

IV. THE LOWER COURT ERRED IN HOLDING THAT THE DENIAL OF ANY PROCESS IN THE STATE COURT FOR THE ENFORCEMENT OF THE CLAIMED RIGHT WAS A MERE MATTER OF LOCAL PRACTICE AND THUS NOT VIOLATIVE OF THE 14th AMENDMENT. IN SO HOLDING THE LOWER COURT MISCONSTRUED THE QUESTION PRESENTED.

The lower Court's decision reads in part as follows:

> "The burden of appellant's argument deals with the question of rights guaranteed him by the Fourteenth Amendment to the Constitution of the United States which will be denied him by the use of evidence illegally obtained at the trial of his case. We think the question thus posed deals exclusively with the admissibility of evidence and state procedure. The Courts of California have held proper the admission of evidence of this character and have sustained convictions based thereon in whole or in part." (R. 45)

The lower Court has ignored the actual question presented and substituted its own question, which it proceeded to erroneously answer as above set forth.

The actual question presented in this regard was that a constitutional right of petitioner had been denied because the State of California, by the decisions of its Supreme Court, **had denied any process or procedure, to be availed of prior to trial, whereby evidence acquired without a search warrant and by unreasonable search and seizure could be suppressed** and excluded as evidence at the trial.[9]

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9. Petitioner concedes that if evidence wrongfully acquired by State agents is not objected to until it is offered at the trial, the Court need not stop the trial to try the collateral issue of how the evidence was acquired. This must be distinguished from the right of petitioner to be accorded a remedy prior to trial for the determination of such question. This distinction is clearly pointed out by this Court in the case of *Weeks v. United States*, 232 U.S. 383.

However, the foregoing holding of the lower Court is erroneous. The claimed right and the denial of any state process for its enforcement are constitutional rights of all citizens of the United States, including petitioner, and such right cannot be denied under the guise of local practice or procedure.

While a State is free to regulate the procedure of its Courts, it, nevertheless, is bound in so doing by the provisions of the Federal Constitution. Thus, in *Brown v. Mississippi*, 297 U.S. 278, 285, this Court states:

> "The State is free to regulate the procedure of its courts in accordance with its own conceptions of policy, unless in so doing it 'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'"

In the late case of *Angel v. Bullington* (decided February 17, 1947), 91 L. ed. Ad. Opinions 557, 560, the inability of a State to deny a federal right under the guise of local practice is stated as follows:

> "This pervasive principle of our federal law, constitutional and statutory, was thus put by Mr. Justice Holmes: 'Whatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice.' Davis v. Wechsler, 263 U.S. 22, 24, 68 L.ed. 143, 145, 44 S.Ct. 13."

The right contended for herein being a Federal right guaranteed by the Federal Constitution, it cannot be defeated by the State claiming a justification for the violation of such right under the guise of local practice.

V. THE RIGHT TO BE SECURE FROM UNREASONABLE SEARCH AND SEIZURE IS A PRIVILEGE AND IMMUNITY OF CITIZENS OF THE UNITED STATES AND IS ONE OF THE EQUAL CIVIL RIGHTS OF SUCH CITIZENS PRESCRIBED BY LAW.

While the lower Court does not actually pass upon this question, it either assumes or concedes that the claimed right is protected by the 14th Amendment. The nature of the right to be secure from unreasonable search and seizure has been discussed many times in the decisions of this Court construing such right as embodied in the 4th Amendment.[10]

In every instance where the Supreme Court of the United States has been called upon to construe the **right** to be secure from unreasonable search and seizure, it has unequivocally held such right to be a fundamental principle of liberty and justice and as of the very essence of constitutional liberty.

The latest expression of the Supreme Court on this subject will be found in the case of *Harris v. United States,* decided May 5th, 1947, 91 L. ed. ad. opinions 1013, 1016, where it is stated:

> "This Court has consistently asserted that the rights of privacy and personal security protected by

10. Petitioner does not contend that because the right to be secure from unreasonable search and seizure is set forth in the 4th Amendment that perforce it is covered by the 14th Amendment, although it is counsel's personal opinion that such is the case. The contention herein advanced is that the right to be so secure from unreasonable search and seizure is such a fundamental right that it is protected by the 14th Amendment. The fact that such right is found in the 4th Amendment adds weight to the claim that it is covered by the 14th Amendment. In the cases hereinafter cited, this Court discusses the *right* as distinguished from the 4th Amendment itself.

> the Fourth Amendment . . . are to be regarded as of the very essence of constitutional liberty; and that the guaranty of them is as important and as imperative as are the guaranties of the other fundamental rights of the individual citizen . . ."

In *Gouled v. United States,* 255 U.S. 298, the Supreme Court, in discussing the Fourth and Fifth Amendments to the Federal Constitution said:

> "It would not be possible to add to the emphasis with which the framers of our Constitution and this court (citing cases) have declared the importance to political liberty and to the welfare of our country of the due observance of **the rights** guaranteed under the Constitution by these two amendments. The effect of the decisions cited is that **such rights are declared to be indispensable to the 'full enjoyment of personal security, personal liberty and private property'; that they are to be regarded as of the very essence of constitutional liberty; and that the guaranty of them is as important and as imperative as are the guaranties of the other fundamental rights of the individual citizen**—the right, to trial by jury, to the writ of habeas corpus and to due process of law."

In *Byars v. United States,* 273 U.S. 28, 33, 71 L.ed. 520, 524, it is said:

> "The 4th Amendment was adopted in view of long misuse of power in the matter of searches and seizures both in England and the colonies; and the assurance against any revival of it, so carefully embodied in the fundamental law, is not to be impaired by judicial sanction of equivocal methods, which, regarded superficially, may seem to escape the challenge of illegality but which, in reality, strike at the substance of the constitutional right."

In the case of *Boyd v. United States,* 116 U.S. 616, the court devotes many pages to the history that led up to the Fourth Amendment to the Constitution of the United States and deals at length with the decision of Lord Camden in the case of *Entick v. Carrington,* and, at page 630 of the reported case, said:

> "The principles laid down in this opinion **affect the very essence of constitutional liberty and security.** They reach further than the concrete form of the case then before the court, with its adventitious circumstances; they apply to all invasions, on the part of the Government and its employees, of the sanctity of a man's home and the privacies of life. **It is not the breaking of his doors and the rummaging of his drawers that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty and private property, where that right has never been forfeited by his conviction of some public offense;** it is the invasion of this sacred right which underlies and constitutes the essence of Lord Camden's judgment. **Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime or to forfeit his goods is within the condemnation of that judgment.** In this regard the Fourth and Fifth Amendments run almost into each other."

In the more recent case of *Go-Bart Importing Co. v. United States,* 282 U.S. 344, 75 L.ed. 374, 382, the foregoing principles were reaffirmed by the Supreme Court:

> **"Since before the creation of our government, such searches have been deemed obnoxious to fundamental**

principles of liberty. They are denounced in the constitutions or statutes of every state in the Union. Agnello v. United States, 269 U. S. 20, 33, 70 L. ed. 145, 149, 51 A.L.R. 409, 46 S. Ct. 4. **The need of protection against them is attested alike by history and present conditions. The Amendment is to be liberally construed and all owe the duty of vigilance for its effective enforcement lest there shall be impairment of the rights for the protection of which it was adopted."**

"General searches have long been deemed to violate fundamental rights."

Marron v. United States, 275 U.S. 192, 195, 72 L.ed. 231, 236.

In *Weeks v. United States,* 232 U.S. 383, 391, 58 L.ed. 652, 655, it is said:

"'It was in that case demonstrated that both of these Amendments contemplated perpetuating, in their full efficacy, by means of a constitutional provision, principles of humanity and civil liberty which had been secured in the mother country only after years of struggle, so as to implant them in our institutions in the fullness of their integrity, free from the possibilities of future legislative change.'"

Summarized, the decisions of the court have pronounced the right to be secure from unlawful search and seizure to be a right **"indispensable to the 'full enjoyment of personal security, personal liberty and private property'"** and that it is **"to be regarded as the very essence of constitutional liberty"** (Gouled v. United States, supra); that it is an **"indefeasible right of personal security, personal liberty and private property"** (Boyd v. United States,

supra); that it is a **principle "of humanity and civil liberty"** (Weeks v. United States, supra); and that a violation of such right is **"obnoxious to fundamental principles of liberty"** (Go-Bart Importing Co. v. United States, supra) and has **"long been deemed to violate fundamental rights."** (Marron v. United States, supra.)

Any right that is the very essence of constitutional liberty, indefeasible and indispensible, and a principle of civil liberty, must be a right and privilege adhering to every citizen of the United States. The War of the Revolution was fought to procure such rights and our subsequent wars fought to preserve them. If such be not rights of United States citizenship, then there is no protection, constitutional or otherwise, for their protection and enforcement.

Turning back to *Boyd v. United States,* supra, the announced nature of the right was derived from the history leading up to the adoption of the Fourth Amendment and this Court, among other things, stated (p. 625):

> "The practice had obtained in the Colonies, of issuing writes of assistance to the revenue officers, empowering them, in their discretion, to search suspected places for smuggled goods, which James Otis pronounced 'the worst instrument of arbitrary power, the most destructive of English liberty and the fundamental principles of law, that ever was found in an English law book;' since they placed 'the liberty of every man in the hands of every petty officer.' This was in February, 1761, in Boston, and **the famous debate in which it occurred was perhaps the most prominent event which inaugurated the resistance of the colonies to the oppressions of the mother country. 'Then and there,' said John Adams, 'then and there**

was the first scene of the first act of opposition to the arbitrary claims of Great Britain. Then and there the child of Independence was born.'

These things and the events which took place in England immediately following the argument about writs of assistance in Boston **were fresh in the memories of those who achieved our independence and established our form of government."**

As the right to be secure from unreasonable search and seizure was the most prominent event which inaugurated resistance of the Colonies to the oppressions of England resulting in the birth of Independence and was the first act leading up to the Revolutionary War, how can it be said that such a right is not a fundamental attribute of American citizenship?

Is the right to be secure from unreasonable search and seizure announced by law to be an equal civil right of citizens of the United States. The answer is in the affirmative.

The federal laws announcing such right are as follows:

"All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, *lease,* sell, *hold* and convey real and personal property."

8 U.S.C.A. sec. 42

"All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and *to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens,* * * *"

8 U.S.C.A. sec. 41

The foregoing announce matters which are attributes of American citizenship.

In the recent decision of this Court in *Oyama v. California,* Decided Jan. 19, 1948, in passing upon the validity of certain provisions of the California Alien Land Law the Chief Justice, referring to 8 U.S.C.A. 42, above set forth, stated:

> "We agree with petitioner's first contention, that the Alien Land Law as applied to this case, deprives Fred Oyama of the equal protection of California's laws and of his privileges as an American Citizen. * * * By federal statute, enacted before the Fourteenth Amendment but vindicated by it, the states must accord to all citizens the right to take and hold real property."

Thus, it was the right of petitioner to acquire by purchase or lease the place he was occupying as his home and dwelling. As a necessary and inherent right to the right to acquire, lease and hold real property, is the right to the peaceful and quiet enjoyment thereof, which includes the right not to have such possession disturbed or such premises invaded by state officers unlawfully breaking in and conducting an unreasonable search and seizure.

VI. THE LOWER COURT ERRED IN HOLDING THAT PETITIONER WAS NOT DENIED THE EQUAL PROTECTION OF THE LAWS AS GUARANTEED BY THE 14TH AMENDMENT.

The lower court has held that the petitioner was not denied the equal protection of the laws as guaranteed by the 14th Amendment. In this the court erred as he was treated and his rights determined in a manner totally at variance from others similarly situated.

All persons occupying their homes and dwellings occupy the same identical status and are entitled to the same protection, privileges and immunities.

That the State of California has made an unlawful distinction between the rights of those whose homes have been invaded by state officers in an illegal manner and without a search warrant and those whose homes were invaded under a search warrant is manifest from comparing the foregoing decisions of the California Supreme Court with the State's Penal Code regulating the use of search warrants.

Sections 1523 to 1541 of the California Penal Code provide for the issuance of search warrants and the procedure to be followed on the return thereon.

Sections 1524 and 1525 provide for the instances in which such a warrant may be issued and that it cannot "be issued but upon probable cause, supported by affidavit, naming or describing the person, and particularly describing the property and the place to be searched."

Section 1535 provides that the officer executing the warrant must give a receipt for the property taken to the person from whom it was taken.

Section 1537 provides that the officer must forthwith return the warrant, after execution, to the magistrate together with a written inventory of the property taken.

Section 1539 states that "if the grounds on which the warrant was issued be controverted, he (the magistrate) must proceed to take testimony in relation thereto * * *"

Section 1540 provides:

> "If it appears that the property taken is not the same as that described in the warrant, or that there is no probable cause for believing the existence of the

grounds on which the warrant was issued, the magistrate must cause it to be restored to the person from whom it was taken."

Here we have a procedure where, **if the officer proceeds in a lawful manner and takes property under a search warrant,** the person from whom the property was taken has his day in Court and if it be determined that the search was unreasonable, in that no probable cause existed for the issuance of the warrant, the property must be returned to him.

Compare this with an instance **where the officer proceeds in an unlawful manner without a search warrant,** and unlawfully breaks into the home of a person and takes property therefrom. In this instance the owner of the property has no redress; he cannot by motion or otherwise have his day in Court; he cannot have it determined whether the search was or was not unreasonable; he cannot have his property restored to him although it be admitted that the search and seizure was both unlawful and unreasonable; he is helpless and the property, which would have been promptly returned to him if the search had been conducted under a warrant, is withheld from him and used as evidence against him in a criminal prosecution.

All persons within the State of California are entitled to the full protection of the constitutional right and to equal opportunity to preserve and vindicate that right. All persons are entitled to be secure in their homes, papers and effects from unreasonable search and seizure.

To provide a means for enforcing the right where the state officers proceed in a lawful manner and to deny any

means for enforcing the right where the officers proceed in an unlawful manner, results in a denial of the equal protection of the laws and constitutes an unlawful discrimination between persons identically situated and entitled, without reservation, to the same rights and remedies.

VII. THE EXPRESS DENIAL BY CALIFORNIA OF ANY REMEDY FOR THE PROTECTION OR REDRESS OF THE CONSTITUTIONAL RIGHT, ITSELF CONSTITUTES A VIOLATION OF THE FOURTEENTH AMENDMENT.

As demonstrated above, the State of California has expressly denied any remedy or procedure whereby one may have protection against unlawful search and seizure or suppress evidence acquired thereby.

It has repeatedly been held by this Court that

> "Upon the state courts, equally with the courts of the Union, rests the obligation to guard and enforce every right secured by the Constitution and laws of the United States whenever those right are invoked in any suit or proceedings before them."
> *United States Bank v. Bank of New York,* 296 U.S. 463, 479;

and in the case of *Mooney v. Holohan,* 294 U.S. 103, 113, ruled:

> "* * * the Attorney General urges that the State was not required to afford any corrective judicial process to remedy the alleged wrong. The argument falls with the premise."

and that the bottom of page 113 states that the state must provide such judicial *corrective process* under the "dominant requirement of the Fourteenth Amendment."

In *Woods v. Nierstheimer*, 328 U.S. 211, 217, and *Carter v. Illinois* (Oct. Term, 1946, No. 36), it is held that where the state provides no judicial process for the protection or enforcement of a constitutional right, that the matter is one that can immediately be corrected in the Federal Courts.

CONCLUSION

Petitioner submits that the Circuit Court of Appeals has rendered a decision that is at total variance with all prior holdings of this Court; that the State of California has destroyed the right to be secure from unreasonable search and seizure and failed to provide any judicial process for the protection of such right; that petitioner has been denied the equal protection of the laws as guaranteed to him by the 14th Amendment; that the removal petition fully stated undisputed facts operating to transfer the cause to the district court. The writ should issue as prayed.

Dated: San Francisco, California,
February 10, 1948.

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Attorney for Petitioner.